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PREVENTING THE INEVITABLE AND AVOIDING THE PROTECTED: THE POTENTIAL USE OF THE INEVITABLE DISCOVERY THEORY IN RELATION TO NON-PRIVILEGED BLOOD SAMPLES FOR USE IN DRINKING AND DRIVING RELATED PROSECUTIONS

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I. INTRODUCTION

Unlawful police activity leading to the recovery of evidence sought to be used against a defendant in a criminal trial may also lead to suppression of such evidence. This is an unfortunate result for prosecutors in important cases where the difference between conviction and acquittal turns on the admissibility of evidence garnered from police conduct contrary to constitutional principles.

The prevention and prosecution of drinking and driving related offenses¹ serves a vital role to the community as a whole, and New York laws designed to combat drinking and driving related offenses have obtained judicial, prosecutorial, and legislative interest over the years.² Studies have demonstrated the greater

¹ Although this piece specifically refers to 'intoxicated drivers,' and those involved in 'drinking and driving related offenses,' it should be noted that the principles highlighted in this article are applied to cases other than those involving strict D.W.I. offenses. Particularly, these principles should be utilized in situations involving persons operating a motor vehicle while their ability to do so is impaired by use of a prohibited drug. See N.Y. VEH. & TRAF. LAW § 1192.4 (McKinney 2005).

² The New York legislators enacted a law to supplement the government's arsenal against drunk driving. See *Pringle v. Wolfe*, 88 N.Y.2d 426, 429 (1996), *cert. denied*, 519 U.S. 1009 (1996).

The Legislature has been most concerned with evidence as to the effect that large quantities of alcohol have on a driver. Accordingly, the legislature has increased the scope of the Judge's power to punish for such offense. It also has provided that the offense is a *per se* offense, so as to eliminate the uncertainty that *prima facie* tests

chance of causing a vehicular collision when one's ability to operate a motor vehicle is affected by the ingestion of alcohol or other substances.³ However, it need not take an empirical or scientific study to understand the concerns of those prosecuting cases involving unfortunate victims of vehicular collisions. For obvious reasons, those prosecuting drinking and driving and other related offenses involving injuries, substantial property damage and fatalities to others seek to strengthen their case to the fullest, in order to best represent not only the interests of the victims, but also the People at large.

When a vehicular collision is involved, a defendant arrested for driving while intoxicated, impaired, or under the influence of drugs may be taken to the hospital for medical treatment. When this individual is been removed to a hospital, routine police procedures ordinarily undertaken in drinking and driving and

invariably create. Originally, the per se offense was established only by a relatively high level of blood-alcohol, but the Legislature has repeatedly lowered the alcohol level requisite for conviction.

People v. Cancel, 137 Misc. 2d 260, 264 (N.Y. Crim. Ct. 1987). The relationship between motor vehicle accidents, fatalities, and intoxicated driving were detailed and given an in-depth look by the New York Legislature when responding to this problem of drunk driving. See *People v. Schmidt*, 124 Misc. 2d 102, 103 (N.Y. Crim. Ct. 1984); see also *Mackey v. Montrym*, 443 U.S. 1, 18 (1978). The court discussed Massachusetts' interest in increasing public safety and the enactment of new legislation. Another court provided a look at the New York Legislature's response to drinking and driving and noted that it "remained disturbed at the high accident tolls involving intoxicated drivers and recognized a 'legislative trend' in making driving while intoxicated laws tougher." *People v. Fox*, 87 Misc. 2d 210, 216-17 (New Castle Justice Ct. 1976). In relation to drinking and driving, the court stated that

[t]he increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The states, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous.

Breithaupt v. Abram, 352 U.S. 432, 439 (1957).

³ See *Alcohol Involvement in Fatal Crashes 2000*, U.S. Department of Transportation National Highway Traffic Administration, at <http://www.nrd.nhtsa.dot.gov/pdf/nrd-30/ncsa/rpts/2002/00alcoholrpt/alc00chap1.htm> (Mar. 2002) (providing statistical information relating to alcohol related accidents, and stating, "[I]t is a well-established fact that drunk driving plays a major role in fatal crashes. Research has demonstrated that alcohol in a driver's bloodstream greatly impairs the driver's ability to operate a vehicle safely"); see also *Traffic Safety Facts 2001 — Alcohol: A Public Information Fact Sheet on Motor Vehicle and Traffic Safety*, National Highway Traffic Safety Administration's National Center for Statistics and Analysis, at <http://www.nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2001/2001alcohol.pdf> (last visited May 11, 2004) (providing statistics for driving and alcohol related offenses). See generally Herbert Moskowitz and Dary Fiorentino, *A Review of the Literature on the Effects of Low Doses of Alcohol on Driving-Related Skills*, National Technical Information Service, at <http://www.nhtsa.dot.gov/people/injury/research/pub/Hs809028/Title.htm> (Apr. 2000) (examining effects of low doses of alcohol on driving-related skills).

related arrests cannot occur.⁴ As such, a defendant's submission to standard physical coordination tests – or routine questioning – does not occur as it would if the person was taken into custody at a police station house.⁵ Likewise, there will be no availability for the taking of a breath test to determine blood alcohol content, because access to an instrument regularly used for breath alcohol testing will not be present in the hospital.

As no standard sobriety tests occur when a defendant is taken to a hospital, a prosecutor's strongest evidence may lie in the defendant's blood sample. Assuming that blood is drawn from a defendant while they are in the hospital, the prosecutor's question becomes whether or not the results of this blood sample potentially demonstrating blood alcohol content are admissible against the defendant at trial.⁶

The New York Vehicle and Traffic Law allows for a prosecutor to apply for a court order to compel a defendant to submit to a blood test in limited circumstances.⁷ Section 1194 (3) of the

⁴ See, e.g., *People v. Berg*, 92 N.Y.2d 701, 703 (1999) (noting some sobriety tests that individuals suspected of driving while intoxicated are requested to perform, such as recitation of alphabet, horizontal gaze nystagmus test, walk and turn test, and one-leg stand); see also *Pennsylvania v. Muniz*, 496 U.S. 582, 585 (1990) (explaining standard sobriety tests that police request of persons suspected of intoxicated driving); *South Dakota v. Neville*, 459 U.S. 553, 555 (1983) (describing physical blood alcohol test evidence that law enforcement attempts to seek from individual suspected of driving while intoxicated).

⁵ *Neville*, 459 U.S. at 555 (discussing blood alcohol test that occurs after drunk driver is arrested).

⁶ See *People v. Moselle*, 57 N.Y.2d 97, 109–10 (1982) (holding there must be consent or court order to obtain results of blood test, as there is no “common-law right to take blood samples in absence of a court order” and that “the taking of blood in any other matter is foreclosed”). But see N.Y. VEH. & TRAF. LAW § 1194 (2) (McKinney 2005) (discussing applicability of implied consent provisions of Vehicle and Traffic Law).

⁷ See N.Y. VEH. & TRAF. LAW § 1194 (3) (McKinney 2005). (stating circumstances, other than obtaining a court order, where defendant can be compelled to submit to a blood test); New York Criminal Procedure Law § 240.40 (2), stating,

Upon motion of the prosecutor, and subject to constitutional limitation, the court in which an indictment, superior court information, prosecutors information, information, or simplified information charging a misdemeanor is pending: (a) must order discovery as to any property not disclosed upon a demand pursuant to section 240.30, if it finds that the defendant's refusal to disclose such material is not justified; and (b) may order the defendant to provide non-testimonial evidence. Such order may, among other things, require the defendant to:

- (i) Appear in a line-up;
- (ii) Speak for identification by witness or potential witness;
- (iii) Be fingerprinted;
- (iv) Pose for photographs not involving reenactment of an event;
- (v) Permit the taking of samples of blood, hair or other materials from his body in a manner not involving an unreasonable intrusion there- of or a risk of serious physical injury thereto;

Vehicle and Traffic Law⁸ allows a compulsory chemical test to be administered when a defendant has 1) killed another, or caused them serious physical injury; 2) has operated a motor vehicle in violation of the drinking and driving statutes embodied within the Vehicle and Traffic Law; 3) has been placed under arrest; and 4) has refused to provide their consent to a chemical test, or is unable to provide their consent.⁹

(vi) Provide specimens of his handwriting;

(vii) Submit to a reasonable physical or medical inspection of his body.

This subdivision shall not be construed to limit, expand, or otherwise affect the issuance of a similar court order, as may be authorized by law, before the filing of an accusatory instrument consistent with such rights as the defendant may derive from the constitution of this state or of the United States. This section shall not be construed to limit or otherwise affect the administration of a chemical test where otherwise authorized pursuant to section one thousand one hundred ninety-four-a of the vehicle and traffic law.

N.Y. CRIM. PROC. LAW § 240.40 (2) (McKinney 2005). As provided for in the statute, a court can order a defendant to submit to a blood test. However, this provision of the Criminal Procedure Law is contained within Article 240, and as such, is rule of discovery, not evidence. In order for a court to be permitted to issue an order pursuant to this statute, the individual from whom the prosecutor wishes to obtain the sample must be an individual who stands charged. As such, there must be an accusatory instrument filed against the individual to get a blood order pursuant to this section. *see also* *People v. Casadei*, 106 A.D.2d 885, 885 (4th Dep't 1984); *Moselle*, 57 N.Y.2d at 109-10; *Matter of Abe A.*, 56 N.Y.2d 288, 291 (1982) (setting forth another alternative for obtaining a court order for a compelled blood sample pursuant to case law).

However, in a practical sense, utilizing C.P.L. § 240.40 is not an effective tool as an alternative to New York Vehicle and Traffic Law § 1194 (3). Use of C.P.L. § 240.40 would inhibit the prosecution's case should the prosecution need to wait until the filing of an accusatory instrument. Both the Vehicle and Traffic Law and the New York Compilation of Codes, Rules and Regulations have a preference for obtaining a sample within two hours of arrest. N.Y. VEH. & TRAF. LAW § 1194 (2)(a)(1)(2) (McKinney 2005). This details the implied consent provisions of the Vehicle and Traffic Law. *Methods and Procedures for Determining Blood and Urine Alcohol*, N.Y. COMP. CODES, R. & REGS. tit. 10, § 59.2 (c)(2) (2004). This further discusses the implied consent provisions. Even the Court of Appeals has recognized the rapid rate in which alcohol dissipates in the blood. *People v. Gursev*, 22 N.Y.2d 224, 230 (1968). Common sense would dictate that between the time of routine arrest processing by the police, the prosecutor's office and the court, and the time in which an accusatory instrument is considered 'filed' for purposes within the meaning of C.P.L. § 240.40 is a substantial period. Thus, there is an ample amount of time for the blood alcohol content within the blood to significantly diminish. By the time a court order pursuant to C.P.L. § 240.40 is signed and executed, its value may be nil. Likewise, a delayed time in execution may lead to the creation of exculpatory evidence. Thus, C.P.L. § 240.40 does not provide the best method of obtaining a D.W.I. defendant's blood sample. N.Y. CRIM. PROC. LAW § 240.40 (2) (McKinney 2005).

⁸ N.Y. VEH. & TRAF. LAW § 1194 (3) (McKinney 2005) (explaining the compulsory chemical test administered in certain circumstances).

⁹ *See* N.Y. VEH. & TRAF. LAW § 1194 (3) (McKinney 2005). The statute states, 3. Compulsory chemical tests.

(a) Court ordered chemical tests. Notwithstanding the provisions of subdivision two of this section, no person who operates a motor vehicle in this state may refuse to submit to a chemical test of one or more of the following: breath, blood, urine or saliva, for the purpose of determining the alcoholic and/or drug content of the blood when a court order for such chemical test has been issued in accordance with the provisions of this subdivision.

However, there are many other situations in which a court order is not authorized pursuant to the Vehicle and Traffic Law, but the prosecutor nevertheless desires to obtain a defendant's blood sample, regardless of whether or not consent was provided for its withdrawal. Such situations include the high profile case, when substantial property damage occurs, or injuries that do not rise to the level of what is considered as serious under the New York Penal Law.¹⁰

In these types of situations which fall outside the realm of criteria necessary for a court order pursuant to Vehicle and Traffic Law § 1194, if blood was drawn at the request of the police, with the consent of the defendant, the narrower question for the prosecutor becomes whether or not this consent was validly obtained. Alternatively, if deemed consent is used to justify admission, the question becomes whether the implied consent prerequisites as set forth in the statute were met and whether the statutory requirements have been followed. Should the results of the blood test indicate a presence of illegal substances, or alcohol in excess of the legal limit, a prosecutor hopes that the answers to these questions are a resounding 'yes.' Should the answer be 'yes,' the results of the defendant's blood alcohol level survive a suppression hearing and can be used against the defendant in the prosecutor's direct case. Then the issues confronted in this article become purely academic. However, should a suppression court find that deemed consent is inapplicable, or the defendant did not provide valid consent to allow the police to withdraw blood from their body, the

(b) When authorized. Upon refusal by any person to submit to a chemical test or any portion thereof as described above, the test shall not be given unless a police officer or a district attorney, as defined in subdivision thirty-two of section 1.20 of the criminal procedure law, requests and obtains a court order to compel a person to submit to a chemical test to determine the alcoholic or drug content of the person's blood upon a finding of reasonable cause to believe that:

- (1) such person was the operator of a motor vehicle and in the course of such operation a person other than the operator was killed or suffered serious physical injury as defined in section 10.00 of the penal law; and
- (2) a. either such person operated the vehicle in violation of any subdivision of section eleven hundred ninety-two of this article, or b. a breath test administered by a police officer in accordance with paragraph (b) of subdivision one of this section indicates that alcohol has been consumed by such person; and
- (3) such person has been placed under lawful arrest; and (4) such person has refused to submit to a chemical test or any portion thereof, requested in accordance with the provisions of paragraph (a) of subdivision two of this section or is unable to give consent to such a test.

¹⁰ See N.Y. PENAL LAW § 10.00 (10) (McKinney 2005).

prosecution's case is substantially weakened, as the results of the blood sample remain within the realm of protected physician-patient privilege.¹¹

For those prosecutors not willing to bet on a judicial finding of valid consent, there are alternative means to amplify the strength of the case. The use of search warrants (and in some cases, subpoenas) to obtain blood samples drawn by hospital personnel during the defendant's stay at the hospital has provided the prosecutor with a highly effective tool in the fight against drinking and driving.¹² However, there may be several caveats that the unwary prosecutor should be made aware of in regards to obtaining a secondary sample. Such caveats include the legal admissibility of this second sample under New York law, as well as scientific principles that may lead to the creation of exculpatory evidence¹³ due to improper preservation of the blood sample. Most prosecutors, like a majority of civil attorneys, may be unfamiliar with the rules of science that relate to the dissipation and absorption of alcohol. This unfamiliarity may be a byproduct of the common attorney's reason for attending law school and desire in becoming a lawyer in the first place—the ultimate legal goal of avoiding anything and everything that has some relation to math and science.

Should a warrant be obtained, and as a result, a secondary sample of blood be made available to the prosecution, it would appear that the prosecution has a strong case. But as time goes on, problems may develop. The two most devastating things that

¹¹ See N.Y. C.P.L.R. § 4504 (McKinney 2005).

¹² See *People v. Bolson*, 183 Misc. 2d 155, 157 (N.Y. Sup. Ct. Queens Cty. 1999). The type of situation discussed in this article, involving already drawn hospital blood, should be distinguished from a situation in which the police or prosecutor seek to obtain a compelled sample. Blood drawn in the latter situation, for D.W.I. and related cases, notwithstanding C.P.L.R. § 240.40, is mainly covered in NEW YORK VEHICLE AND TRAFFIC LAW § 1194 (3). Situations not falling within the realm of V.T.L. § 1194 (3), where compulsory blood samples are sought, are governed by the principles of *Matter of Abe A.*, 56 N.Y.2d 288 (1982), in which the Court of Appeals held that a court order for a defendant's blood sample may be obtained when it is established that: there is "(1) probable cause to believe the suspect has committed the crime; (2) a 'clear indication' that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable." *Id.* at 291. The Court further stated that "the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it," must be weighed against "the suspect's constitutional right to be free from bodily intrusion" *Id.*

¹³ See *Brady v. Maryland*, 373 U.S. 83, 90-91 (1963) (holding that evidence that is material and exculpatory must be turned over to the defendant as a principle of due process).

could happen are: A) the consent for the initial blood sample is deemed invalid; and B) the secondary sample was not preserved and/or does not or cannot provide a proper blood alcohol content reading. At this point, what was initially thought of as a strong case with two separately tested blood samples turns into a weaker case with no accurate blood analysis.

At this point, although hope may seem lost for the moment, a prosecutor may have some salvation in utilizing an inevitable discovery theory to allow the initial blood sample, suppressed due to a judicial determination of a lack of valid implied or express consent, to be admissible and used against the defendant at trial.

This article delves into this issue and raises the question of whether an initially obtained blood sample ultimately suppressed can nevertheless be used if a search warrant is obtained for a secondary sample. This article further provides a discussion about the interrelation of the inevitable discovery theory as an exception to the general evidentiary exclusionary rule and the use of search warrants in drinking and driving related offenses; two areas of the law that may appear wholly incomparable.

II. INEVITABLE DISCOVERY

It is a common understanding that evidence obtained by illegal police conduct – the ‘fruit of the poisonous tree’ – is subject to suppression.¹⁴ The rationale behind this rule is to prevent law enforcement officials from violating an individual’s rights, act as a deterrent, and not afford the government an opportunity to use evidence against a defendant obtained through exploitation of police misconduct.¹⁵ Suppression of unlawfully obtained evidence serves an equitable remedy—to prevent the government from being in “a better position than it would have been in if no illegality had transpired.”¹⁶

¹⁴ See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (explaining the “exclusionary rule”); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (becoming the first Supreme Court case to speak of the “exclusionary rule” and holding that that this rule applies to the illegally obtained evidence as well as other incriminating evidence derived from the initially obtained evidence); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (discussing procedure for wrongfully obtained evidence).

¹⁵ See *Wong Sun*, 371 U.S. at 487–88 (noting evidence that comes forth based on illegal police actions should not be treated as “poison”).

¹⁶ *Nix v. Williams*, 467 U.S. 431, 443 (1984) (rationalizing exclusion of illegally obtained evidence).

However, unlawful police action will not always result in suppression of evidence.¹⁷ Courts have carved out certain explicit exceptions to the general exclusionary rule.¹⁸ One such exception is the 'inevitable discovery' doctrine.

The 'inevitable discovery' doctrine gained much notoriety in the infamous case of *Nix v. Williams*.¹⁹ The *Nix* case appeared to be Robert Williams' second bite at the Supreme Court apple after being convicted twice of the 1968 murder of ten-year-old Pamela Powers.²⁰ However, *Nix v. Williams*²¹ may be more popularly known as the second time that the Supreme Court was encountered with the 'Christian Burial Speech' case.²²

In *Nix*, an arrest warrant was obtained for Robert Williams after a fourteen-year-old boy spotted him in the area where Powers was last seen—a Des Moines Y.M.C.A. building—at a time when Williams was holding a large bundle with two white legs inside of it.²³ Within two days of the victim's disappearance, a large-scale search was performed covering miles around the area, designed to search all locations where a young girl's body could be.²⁴

¹⁷ We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Wong Sun, 371 U.S. at 487–88.

¹⁸ See, e.g., *United States v. Ceccolini*, 435 U.S. 268, 276 (1977) (citing *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)) (analyzing factors to determine attenuation, such as time difference between illegal activity and discovery of evidence, flagrancy of police misconduct, presence of intervening circumstances, and voluntary willingness of prosecutorial witness to come forward).

¹⁹ 467 U.S. 431 (1984). It should be noted that many lower courts had already adopted or used this theory in criminal prosecutions. In fact, the Supreme Court received numerous amicus curiae briefs from other jurisdictions, including Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

²⁰ See *Brewer v. Williams*, 430 U.S. 387, 440–41 (1977) (holding Williams had right to new trial because he was denied Sixth Amendment rights).

²¹ 467 U.S. 431 (1984).

²² See *id.* at 453 (detailing burial speech that took place between Williams and Detective Leaming).

²³ See *id.* at 434 (stating testimony of witness who helped Williams open his car door).

²⁴ See *id.* at 435 (explaining search of several miles done by two hundred volunteers).

As this massive search was being conducted, Williams surrendered to authorities in Davenport, Iowa.²⁵ The defendant was arraigned in Davenport, and had retained an attorney. This attorney, in conversation with both Davenport and Des Moines authorities, came to an understanding with both law enforcement agencies that no one would question Williams until he was returned to Des Moines and in the attorney's presence.²⁶ Arrangements were made to return Williams to Des Moines, and two Des Moines detectives traveled to Davenport, picked up Williams, with the intent to return him to Des Moines.²⁷ These detectives were fully aware that counsel represented the defendant.²⁸ As the detectives rode back to Des Moines with Williams, one detective, who knew that Williams was both a former mental patient as well as a deeply religious individual,²⁹ had a conversation with Williams that would forever be known as the 'Christian Burial speech.'³⁰ While in the police car, one of the detectives stated,

I want to give you something to think about while we're traveling down the road. . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a

²⁵ See *id.* at 435 (observing that he surrendered to the local police).

²⁶ See *Brewer v. Williams*, 430 U.S. 387, 391 (1977) (stating, "Williams was not to talk to the officers about Pamela Powers until after consulting with McKnight upon his return to Des Moines").

²⁷ See *Nix v. Williams*, 467 U.S. 431, 435 (1984) (observing while Williams was being picked up, volunteers and police initiated a large scale search for the body).

²⁸ See *Brewer*, 430 U.S. at 391 (noting the detectives conversed with counsel).

²⁹ See *id.* at 392 (noticing talk about religion occurred during the car ride).

³⁰ See *id.* at 392 (noting that "Detective Leaming delivered what has been referred to in the briefs and oral arguments as the 'Christian burial speech').

snow storm and possibly not being able to find it at all. . . I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road.³¹

Subsequently, Williams spoke and directed the detectives to the location of the Power's body.³² After Williams had provided this information, the massive search was called off.³³ However, one search team working on the case was only two and a half miles away from this location at this time, and moving in on the location of the body.³⁴ The actual location of the body was within the parameters of the area to be searched.³⁵

In the defendant's first trial for murder, the defendant's responses to the detective's statements were used against him.³⁶ Ultimately, the Supreme Court found that all statements made subsequent to the Christian Burial Speech were obtained in violation of the defendant's right to counsel, as the defendant had previously been arraigned.³⁷ In the defendant's second murder trial, the prosecution did not use the defendant's statements, but did use evidence relating to the victims body, such as the condition that it was in when it was found, as well as tests performed on the body.³⁸

On the above facts, despite previously holding that the direct evidence, the defendant's statements indicating the whereabouts of the body, were suppressed because it was obtained unlawfully,³⁹ in *Nix v. Williams*, the Supreme Court found that evidence derived from the body could be admissible under an 'inevitable discovery' theory.⁴⁰

³¹ See *id.* at 392-93.

³² See *Nix v. Williams*, 467 U.S. 431, 436 (1984) (stating, "the child's body was found next to a culvert in a ditch beside a gravel road in Polk County, about two miles south of Interstate 80, and essentially within the area to be searched").

³³ See *id.* at 436 (stating Williams agreed to direct officers to child's body and that search was called off).

³⁴ See *id.* at 436 (describing location of search team).

³⁵ See *id.* at 436 (stating child's body was within area to be searched).

³⁶ See *id.* at 436-37 (noting defendant's responses were prompted by detective).

³⁷ See *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (stating right to counsel arises after arraignment).

³⁸ See *Nix v. Williams*, 467 U.S. 431, 437 (1984) (noting admission of evidence such as post mortem test results of victim's body).

³⁹ See *id.* at 437 (explaining statements were obtained from defendant in violation of his right to counsel).

⁴⁰ See *id.* at 437 (deciding the body would have been discovered even in absence of incriminating statements by defendant).

In *Nix*, the Supreme Court found that because of the type of search that was conducted, involving the services of numerous volunteers, had the search continued, the victim's body would have inevitably been discovered.⁴¹ The *Nix* case set forth the standard that the prosecution must demonstrate in furtherance of an inevitable discovery claim.⁴² The Supreme Court held that so long as the prosecution could demonstrate that there was a high degree of probability that the evidence would have been obtained lawfully, then it will not be subject to suppression.⁴³ The *Nix* Court justified this rule with the rationale that "the prosecution should not be placed in a *worse* position [and thus not be allowed to introduce evidence at trial] simply because of some earlier police error or misconduct."⁴⁴

Like the Supreme Court, New York has adopted the inevitable discovery theory to deny a motion to suppress.⁴⁵ The New York Court of Appeals has applied inevitable discovery principles stating, "evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence."⁴⁶

However, the New York Court of Appeals has had more opportunities to discuss the inevitable discovery doctrine than the Supreme Court, and has defined the type of evidence to which the inevitable discovery exception to the general exclusionary rule applies.⁴⁷ In cases in which the inevitable discovery theory was advanced, the Court of Appeals has made a

⁴¹ See *id.* at 437 (noting body would have been discovered in any event).

⁴² See *id.* at 441 (establishing both state and federal courts recognize inevitable discovery exception to exclusionary rule).

⁴³ See *Nix v. Williams*, 467 U.S. 431, 444 (1984) (stating, "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received.").

⁴⁴ *Id.* at 443. [emphasis added].

⁴⁵ See *People v. More*, 97 N.Y.2d 209, 214 (2002) (recognizing, although not applying, inevitable discovery theory).

⁴⁶ *People v. Fitzpatrick*, 32 N.Y.2d 499, 506 (1973). See generally *People v. Payton*, 45 N.Y.2d 300, 313 (1978) (holding proof in this case meets standard of inevitable discovery doctrine and, therefore, tainted evidence is admissible), *rev'd on other grounds*, 445 U.S. 573 (1980).

⁴⁷ See *People v. Turriago*, 90 N.Y.2d 77, 86 (1997) (announcing prosecution must demonstrate "very high degree of probability" to establish inevitable discovery exception that normal police procedures would have discovered challenged evidence).

clear distinction between the use of primary evidence and secondary evidence obtained from tainted police action.⁴⁸ In *People v. Stith*,⁴⁹ the Court of Appeals distinguished 'primary evidence,' which is "obtained during or as immediate consequence,"⁵⁰ from 'secondary evidence,' which is "obtained indirectly as a result of leads or information gained from that primary evidence."⁵¹ In *Stith*, the Court specifically noted that primary evidence would still be subject to suppression regardless of whether or not there existed a high degree of probability that such evidence would have been discovered anyway.⁵² However, the *Stith* Court noted that secondary evidence could be admissible under an inevitable discovery theory, so long as the prosecution demonstrates with a very high degree of probability that abidance to normal police procedures would have lead to the discovery of the challenged evidence independently of the tainted source.⁵³ Lower New York courts have recognized this distinction and have refused to admit the "very evidence that was obtained as the immediate consequence of the illegal police conduct."⁵⁴

III. THE NEW YORK PHYSICIAN-PATIENT PRIVILEGE

Unless the circumstances are those in which court-ordered blood samples are allowed, as noted *supra*, if a search warrant or subpoena is not obtained for the actual sample, the results of tests performed on already drawn hospital blood from a D.W.I. defendant can only be used if the People rely on the implied consent provisions of the Vehicle and Traffic Law,⁵⁵ or the

⁴⁸ See *id.* (distinguishing between primary and secondary evidence and outlining that primary evidence would be excluded even if it would most likely have been discovered in course of normal police procedures, but, secondary evidence, on the other hand, could possibly be admitted).

⁴⁹ 69 N.Y.2d 313 (1987).

⁵⁰ *Id.* at 318.

⁵¹ *Id.* at 318; see also *Turriago*, 90 N.Y.2d at 86.

⁵² See *Stith*, 69 N.Y.2d at 318 (noting it is tainted evidence itself and not product of evidence that is saved from exclusion).

⁵³ *Id.* at 318 (stating "It is not the tainted evidence that is admitted, but only what was found as a result of information or leads gleaned from the evidence.").

⁵⁴ *People v. James*, 256 A.D.2d 1149, 1149 (4th Dept. 1998) (noting any interpretation by New York court to admit primary evidence is "misplaced"); see also *People v. Vega*, 256 A.D.2d 730, 731 (3d Dept. 1998) (noting the "inevitable discovery" doctrine applies only to secondary evidence and not to the items uncovered in an illegal search).

⁵⁵ See N.Y. VEH. & TRAF. LAW § 1194 (2)(a) (McKinney 2005) (containing deemed consent provisions). The statute states:

defendant has provided actual consent to having their blood drawn.⁵⁶ In New York, in the absence of the applicability of the deemed consent statute, a defendant's consent to the drawing of blood is valid so long as it is express and voluntary.⁵⁷ A court may entertain a defense motion pursuant to New York Criminal Procedure Law § 710.20 (5),⁵⁸ and suppress the results should it

Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:

(1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of section eleven hundred ninety-two of this article and within two hours after such person has been placed under arrest for any such violation; or having reasonable grounds to believe such person to have been operating in violation of section eleven hundred ninety-two-a of this article and within two hours after the stop of such person for any such violation,

(2) within two hours after a breath test, as provided in paragraph (b) of subdivision one of this section, indicates that alcohol has been consumed by such person and in accordance with the rules and regulations established by the police force of which the officer is a member. . . .

(emphasis added); *see also* *People v. Goodell*, 79 N.Y.2d 869, 870 (1992) (noting where conditions of § 1192 are satisfied, statute provides authority for administration of blood alcohol test even in absence of court order or suspect's actual consent); *People v. Hart*, 266 A.D.2d 698, 699 (3d Dept. 1999) (stating under implied consent provision "[a] motorist is deemed to have consented to the administration of a blood alcohol test provided that there were reasonable grounds to believe that such individual was driving while intoxicated . . ."); *People v. Capraella*, 165 Misc. 2d 639, 643 (N.Y. City Crim. Ct. 1995) (stating, "in exchange for the privilege of being licensed to drive in this State, every motorist in this State is deemed to have given advance consent to submit to such a 'search' where certain conditions precedent are present").

⁵⁶ *See Capraella*, 165 Misc. 2d at 644 stating:

[A] simple request to submit to a breathalyzer examination without more, can result in a voluntary consent as long as there is no express or implied coercion by law enforcement officials, no material misrepresentation of fact, to induce the consent and no facts to suggest that any law enforcement officials in securing an individual's consent acted in a manner so fundamentally unfair as to constitute a due process violation as to negate any consent.

see also *People v. Atkins*, 85 N.Y.2d 1007, 1008 (1995) (noting there must be express and voluntary consent if implied consent statute is not applicable).

⁵⁷ *See Atkins*, 85 N.Y.2d 1007, 1008; *People v. Ellis*, 190 Misc.2d 98, 105 (Cattaraugus Co. Crim. Ct. 2001) (stating in case where defendant contested consent provided, that "the prosecution must prove by clear and convincing evidence that a consent was unequivocally, voluntary and free given by a suspect"). *see also* *United States v. Drayton*, 536 U.S. 194, 206–07 (2002) (confirming consent must be voluntary based on totality of circumstances); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973) holding,

only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances.

⁵⁸ N.Y. CRIM. PROC. LAW § 710.20 (5) (McKinney 2005).

find that deemed consent was not applicable or valid consent was never provided.⁵⁹

Without valid consent, the results of blood samples drawn at the request of the police will not be admissible against the defendant at trial due to the physician-patient privilege.⁶⁰ This evidentiary privilege, codified in New York Civil Practice Law and Rules § 4504,⁶¹ affords privilege to "confidential communications," and states,

Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services.⁶²

⁵⁹ See *People v. Ayala*, 89 N.Y.2d 874 (1996) (finding that Criminal Procedure Law § 710.20 (5) allows motions for suppression for chemical tests, regardless of whether they are court ordered or otherwise).

⁶⁰ However, one New York case should be pointed out. In *People v. Ameigh*, 95 A.D.2d 367 (3d Dept. 1983), the Third Department allowed the results of the defendant's blood alcohol test to be used against the defendant at trial. In this case, hospital personnel drew blood samples for diagnostic testing and treatment. When asked to submit to a blood test to determine blood alcohol content, the defendant refused. The People obtained information regarding the defendant's blood alcohol content through pre-trial discovery, and used this information against the defendant at trial. Despite the issue in this case being the use of the information by the prosecution, there was no mention of the physician-patient privilege. Perhaps the argument was never made because the defendant did not raise it, and voluntarily handed over the results of the blood test without claiming privilege. It is unclear why issues concerning the physician-patient were not discussed in the opinion, but the Court did note that "[a]ny other possible evidentiary objections to the admissibility of the test results may be properly raised at the trial." *Id.* at 369-70. Nevertheless, this case seems like a prime situation in which the privilege should have been asserted to preclude admission of evidence regarding the defendant's blood alcohol level at trial.

⁶¹ N.Y.CPLR § 4504 (McKinney 2005) (describing confidentiality within physician patient privilege).

⁶² N.Y. CIV. PRAC. LAW & R. § 4504 (McKinney 2005) (noting valid consent to law enforcement request is construed as waiver).

The Court of Appeals has outlined the purpose behind this privilege. The Court has noted that this privilege “serves three core policy objectives⁶³ . . . [1] it] seeks to maximize unfettered patient communication with medical professionals. . .;⁶⁴ [2] it] encourages medical professionals to be candid in recording confidential information in patient medical records. . .;⁶⁵ [and 3] it] protects patients’ reasonable privacy expectations against disclosure of sensitive personal information. . .”⁶⁶ Over time, New York courts have afforded this provision “broad and liberal construction to carry out” these policies.⁶⁷ Likewise, statutes that may be interpreted to limit the scope of this New York physician-patient privilege have been narrowly interpreted.⁶⁸

Although it appears that this privilege is given great weight, only those matters falling within the protections of the privilege are covered. This privilege, as noted above, protects ‘confidential communications,’ which is, in turn, information between physician and patient. Other types of evidence obtained during the normal course of treatment are not afforded the same protections as information. One type of evidence obtained during the course of treatment not categorized as information is tangible property. Although great measures are taken to protect communications between physician and patient, tangible property obtained is not protected in the same manner.⁶⁹

Because of the differences between protected information and unprotected tangible property,⁷⁰ when confronted with a driving

⁶³ *In re New York County v. Morganthau*, 98 N.Y.2d 525, 529 (2002).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*; see also *People v. Bloom*, 193 N.Y. 1, 7 (1908) (providing the origin of the physician-patient privilege).

⁶⁷ *In re Grand Jury Investigation of Onondaga County*, 59 N.Y.2d 130, 134 (1983) (citing *In re City Council of N.Y. v. Goldwater*, 284 N.Y. 296, 300 (1940)); see *People v. Decina*, 2 N.Y.2d 133, 143 (1956) (noting statute should be “liberally construed”).

⁶⁸ See *People v. Sinski*, 88 N.Y.2d 487, 491 (1996) (recognizing courts have narrowly interpreted limitations on physician-patient privilege). But see *In re Grand Jury Subpoena Duces Tecum Dated December 14, 1984 v. Kuriansky*, 69 N.Y.2d 232, 240 (1987) (holding physician-patient privilege yields to investigation concerning Medicaid fraud).

⁶⁹ See *People v. Downs*, 5 A.D.2d 935, 936 (3d Dept. 1958) (establishing blood specimen as evidence rather than “information”); see also *People v. Kemp*, 59 A.D.2d 414, 419 (1st Dept. 1977) (concluding that testimonial marital privilege, which is similar to physician-patient privilege, cannot be used to prevent admission of physical evidence obtained via communications within realm of marital privilege).

⁷⁰ The distinction between the protections afforded to information as compared to tangible property under the physician-patient privilege appears to be strikingly similar to

while intoxicated related offense, a clear distinction must initially be made. Should the case be dependent upon admission of the results of blood tests performed on the defendant while in the hospital to determine the level of intoxication, potentially protected and privileged results of the blood test, as compared to the actual blood sample itself should be distinguished. Unlike the actual sample, without obtaining a valid waiver⁷¹ of the physician-patient privilege by the defendant prior to the drawing of blood, the results of the blood test will be inadmissible as falling within the protections of the physician-patient privilege.⁷²

the distinction between protected testimonial evidence under the self-incrimination clause and items deemed non-testimonial, which do not convey the thoughts of one's mind. Non-testimonial evidence is not subject to any Fifth Amendment protection because the witness was never compelled to be a witness against himself within the meaning of the Fifth Amendment. *See e.g., Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990).

The Supreme Court has articulated that in order for a communication to be testimonial and therefore protected by the privilege against self-incrimination, it must "relate to a factual assertion or disclose information." *Doe v. United States*, 487 U.S. 201, 210 (1988). On the other hand, the Supreme Court has declared that "compulsion which makes a suspect or accused the source of 'real or physical evidence'" does not violate the privilege against self-incrimination. *Schmerber v. California*, 384 U.S. 757, 764 (1966). The Court has also stated that the "prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Holt v. United States*, 218 U.S. 245, 252-53 (1910). This distinction has been used to admit voice exemplars that were not used for "testimonial or communicative content." *United States v. Dionisio*, 410 U.S. 1, 5-7 (1973). It has also been recognized to compel criminal defendants to "put on a shirt, to provide a blood sample, or a handwriting exemplar, or to make a recording of his voice." *United States v. Hubbell*, 530 U.S. 27, 35 (2000). Finally, the Court has held that a criminal defendant's refusal to take a sobriety test is admissible. *See South Dakota v. Neville*, 459 U.S. 553, 564 (1983).

The standards articulated by the Supreme Court have been applied by New York courts. The New York Court of Appeals has stated that a testimonial communication "relate[s] a factual assertion or disclose[s] information." *People v. Berg*, 92 N.Y.2d 701, 704 (1999). It has also described testimonial communications as "reveal[ing] a person's subjective knowledge or thought processes." *People v. Hager*, 69 N.Y.2d 141, 142 (1987). Applying these definitions, the Court of Appeals has concluded that results from performance tests are admissible. *See also People v. Jacquin*, 71 N.Y.2d 825, 826 (1988). The Court of Appeals has also held that evidence that a defendant refused to take a sobriety test is admissible as long as it was not "extracted from the defendant by compulsion." *People v. Thomas*, 46 N.Y.2d 100, 107 (1978). Finally, the New York City Criminal Court has found that a defendant's verbal consent to a sobriety test is admissible. *People v. Rosario*, 136 Misc.2d 445, 449 (N.Y. City Crim. Ct. 1987).

⁷¹ *See People v. Petro*, 122 A.D.2d 309, 310 (3d Dept. 1986) (finding blood test results as suppressed under physician-patient privilege if defendant did not waive privilege and no exception applied).

⁷² *See Dillenbeck v. Hess*, 73 N.Y.2d 278, 289 (1989) (declaring defendant had not waived physician-patient privilege and therefore, information regarding his blood alcohol content from blood test taken at hospital following car accident "indisputably falls within the scope of the physician-patient privilege"); *see also Petro*, 122 A.D.2d at 310 (asserting blood test results as indicating defendant's blood alcohol level obtained without valid waiver from defendant were not admissible pursuant to physician-patient privilege). *But see People v. Hagin*, 238 A.D.2d 714, 715 (3d Dept. 1997) (analyzing case where defendant consented to having blood drawn and explaining that Vehicle and Traffic Law § 1194

IV. THE USE OF SEARCH WARRANTS IN NEW YORK CRIMINAL PROSECUTIONS TO WORK AROUND THE PHYSICIAN PATIENT PRIVILEGE.

An unwary prosecutor should note this critical distinction between information and tangible evidence. Although, when blood test results are an issue in drinking and driving related offenses, the blood tests as well as the results garnered from those tests may seem inextricably interwoven, there may be a safe way for prosecutors to lawfully obtain information from these samples that falls within the privilege.⁷³ This is through use of what is commonly referred to as a '*Bolson* warrant' for already-drawn blood samples.⁷⁴

(4)(a)(1)(i) does not allow defendant to exclude blood test results regarding blood alcohol content based on nurse-patient privilege because test was not essential to defendant's treatment) (citation omitted).

⁷³ *Bolson* warrants may be a way around the procedures that must be followed in order to obtain blood test results because it is hospital-drawn blood, and not police-obtained blood, that is being sought. *People v. Bolson*, 183 Misc.2d 155, 159–60 (N.Y. Sup. Ct. Queens Cty 1999).

In addition, there may be a distinction between the admissibility of blood and other chemical test results obtained via use of *Bolson* warrants for charges of Vehicle and Traffic Law § 1192.2, as compared to § 1192.3. *See* N.Y. VEH. & TRAF. LAW § 1192.2 (McKinney 2005). (stating "[n]o person shall operate a motor vehicle while such person has .10 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article."). In contrast, section 1192.3, which is considered the 'common law' D.W.I. charge, makes no such reference to the procedures mandated by Section 1194. N.Y. VEH. & TRAF. LAW § 1192.3 (McKinney 2005).

⁷⁴ *Bolson*, 183 Misc. 2d at 159–60 (articulating when blood samples do not fall within physician-patient privilege).

It is important to note that the warrant must be valid pursuant to New York Criminal Procedure Law. *See* N.Y. CRIM. PROC. LAW § 690.35 (McKinney 2005). Also, the Supreme Court has held that a search warrant requires a showing of probable cause. *Aguiar v. Texas*, 378 U.S. 108, 112 (1964). Probable cause can be established through hearsay information as long as there is evidence of the informant's knowledge and reliability. *Id.* at 114–115. This standard has been consistently followed and elaborated on by the Court. *Spinelli v. United States*, 393 U.S. 410, 412–17 (1969).

New York also requires that a warrant meet the *Aguiar-Spinelli* standard and that there is "a reasonable showing that the informant was reliable and had a basis of knowledge for the statement." *People v. Hetrick*, 80 N.Y.2d 344, 348 (1992). If one of the *Aguiar-Spinelli* requirements is not met, the search warrant cannot be validly executed. *see also*, *People v. Serrano*, 93 N.Y.2d 73, 78 (1999). New York courts have also asserted that information is accepted as reliable if it is given to the police by an identified person or based on the first-hand observations of a police officer.

It should also be noted that procuring tangible blood samples by use of subpoena rather than by search warrant has been accomplished, yet there is no printed litigated precedent on point. Although there are both substantive and procedural distinguishing characteristics between search warrants and subpoenas, the question regarding tangible evidence versus information for doctor-patient privileges remains the same. *Hubbell*, 530

*People v. Bolson*⁷⁵ involved a motor vehicle accident and a defendant suspected of driving a motor vehicle while intoxicated.⁷⁶ The defendant was taken to the hospital, where three blood samples were drawn for treatment, and an additional sample was drawn for "for the specific purpose of testing for alcohol."⁷⁷ Two days after this blood was drawn, a search warrant was obtained "to procure and test the samples of the defendant's blood held by" the hospital.⁷⁸ Subsequent to the execution of the warrant, all samples were tested by the New York Medical Examiner's Office.⁷⁹

The defendant moved to controvert the search warrant on several grounds, including that the information obtained from the warrant was "privileged and confidential."⁸⁰ Addressing whether or not the subject matter of the warrant was protected by the physician-patient privilege, the *Bolson* Court acknowledged that the results of the test "contain[ed] the kind of information which 'was the product of professional skill and knowledge and . . . [thus] a protected communication'" pursuant to C.P.L.R. § 4504.⁸¹ However, the *Bolson* Court went a step further by aptly pointing out that privileged results were not the items to be sought; but rather, the actual blood samples were the items to be sought.⁸² Because these actual samples were "physical evidence,"⁸³ the physician-patient privilege was not applicable and the test results obtained by the Medical Examiner's Office of the lawfully obtained blood samples were admissible against the defendant at trial.⁸⁴ Further, although

U.S. at 35-37. Thus, a prosecutor may wish to utilize a subpoena to obtain blood rather than a warrant.

⁷⁵ 183 Misc. 2d 155 (N.Y. Sup. Ct. Queens Cty. 1999).

⁷⁶ See *id.* at 157.

⁷⁷ *Id.* at 157.

⁷⁸ *Id.* at 157.

⁷⁹ *Id.* at 157 (describing testing process of blood samples).

⁸⁰ *People v. Bolson*, 183 Misc. 2d 155, 157 (N.Y. Sup. Ct. Queens Cty. 1999).

⁸¹ *Id.* at 159 (citing *Dillenbeck*, 73 N.Y.2d 278, 284 n.4 (1989)).

⁸² *Bolson*, 183 Misc. 2d at 159 (noting privileged blood alcohol test results were not to be obtained by warrant).

⁸³ *Id.* at 156.

⁸⁴ It should be noted that the *Bolson* court distinguished between the three vials drawn for treatment and the additional vial drawn to determine blood alcohol content. *Id.* at 160. Although the Court noted that the vial drawn for the purpose of determining blood alcohol content was not necessary for the defendant's treatment, the *Bolson* decision does not reflect a substantive difference between those vials drawn for treatment and the vial drawn for a blood alcohol content determination. Instead, the *Bolson* decision to deny suppression of the results of the blood test focuses on the items sought by the warrant,

the *Bolson* Court noted that “[r]esults generated by [a] defendant’s treating physician *at the hospital* for purposes of treatment and diagnosis remain under the protective aegis of the physician-patient privilege,”⁸⁵ the *Bolson* Court pointed out that since “a blood sample is not unlike other tangible property. . . the seizure of the blood samples simply does not impinge upon or seek to pierce the physician-patient privilege.”⁸⁶

V. APPLICATION OF THE INEVITABLE DISCOVERY THEORY

A. *Why Use It*

Maybe going into detail about the physician-patient privilege assumes too much. Perhaps it is assuming that the consent of the defendant was not validly obtained – it was not impliedly or expressly and voluntarily provided⁸⁷ – thus bringing the results of the test back into the realm of privileged physician-patient communications. The prosecutor’s goal is to prevent this from

physical and real evidence, which is not protected under C.P.L.R. § 4504. It would appear that from this decision, although the purposes in drawing the multiple vials may have been different, in the end, this marks, for criminal prosecution purposes, a distinction without a difference. *Id.* at 160.

⁸⁵ *Id.* at 160 (emphasis added).

⁸⁶ *People v. Bolson*, 183 Misc.2d 155, 159 (N.Y. Sup. Ct. Queens Cty. 1999); *Cf. People v. Thomas*, No. 01-0429-001, 2001 WL 1722892, *1 (Sup. Ct. Erie Cty. Oct. 30, 2001). *Thomas* involved a motor vehicle accident with motorist suspected of driving while intoxicated. Two of the defendant’s passengers died at the scene as a result. After the defendant was admitted to a hospital, ten vials of blood were drawn “for diagnostic and treatment purposes.” Approximately an hour and a half later, the defendant consented to having his blood drawn to determine blood alcohol content. Five days after the accident, a search warrant was obtained for one of the vials drawn for diagnostic and treatment purposes. The warrant did not authorize seizure of any records. Because of the search warrant, and the separate testing of the actual blood sample, the prosecution had two separate pieces of evidence indicating the defendant’s blood alcohol level.

The *Thomas* court did not permit the test results of the blood vial obtain via the search warrant to be admitted against the defendant. The *Thomas* court attempted to distinguish the facts presented to those in *Bolson*. However, no clear distinction was made. Although the *Thomas* decision alluded to the principles of the physician-patient privilege, introduction of the secondary test results was denied for the sole reason of not admitting cumulative evidence. The *Thomas* court stated, “[s]ince the prosecution already has evidence of the defendant’s blood alcohol content obtained within two hours of his arrest, there is no need to introduce test results of blood drawn for diagnostic and treatment purposes.” In denying admission on this ground, the *Thomas* court did not detract from the *Bolson* distinction between tangible property and privileged information.

⁸⁷ See *People v. Atkins*, 85 N.Y.2d 1007, 1008–09 (1995) (implying that consent of defendant is validly obtained when either impliedly or expressly and voluntarily provided).

occurring. So, as noted, the prosecutor should never be so confident as to place all of his eggs into one basket and depend solely on surviving a suppression motion on a premonition that consent was valid. This should be an important concern to the prosecutor of the driving while intoxicated offense when the case involves substantial property damage, multiple victims, is high-profile, or when injuries occur but do not rise to the level of what criteria is necessary for a court-ordered compulsory blood test.

As this type of case is not one where the prosecutor should gamble, the principles of inevitable discovery may be useful to protect the case. In sum, the question to be asked should be, if the case is one in which a *Bolson* warrant is obtained for actual tangible blood samples, could the warrant be used to retroactively justify the validity of the initial sample if the secondary sample does not return accurate results, is not tested, or is itself not legally admissible.

B. Effects on a Subsequent Sample

Utilization of the inevitable discovery theory in relation to blood samples of intoxicated defendants should only arise when the secondary sample—the very sample sought to be obtained through the *Bolson* warrant—has been affected in some way, and a proper blood alcohol reading cannot be obtained by its analysis. A secondary sample can be affected in a myriad of ways.

Without delving into every possible reason for how a sample of blood can become unreliable, for purposes of this article, it would be most practical to discuss the most probable way that a sample can be affected. This would occur most likely through failure to properly preserve the specimen, or if the specimen is so insufficient that valid testing cannot be performed on it.⁸⁸

When a 'blood-job' is performed by a trained officer on an individual suspected of driving a motor vehicle while intoxicated, the blood specimen is preserved to prevent the blood from clotting, or changing its form or decaying, in any type of manner that would affect or distort the defendant's correct blood alcohol

⁸⁸ See Department of Pathology Clinical Services, *Collecting Blood Specimens*, UTMB Laboratory Survival Guide, May 31, <http://www.utmb.edu/lsg/LabSurvivalGuide/CollectingBloodSpecimens.html> (last visited May 28, 2005) (discussing potential ways blood specimens can be affected).

content.⁸⁹ Officers trained to administer 'blood jobs' are familiar with the items found in a standard blood kit. These items, namely 'vacutainer'⁹⁰ tubes containing preservatives, sterile needles, non-alcoholic swabs, evidence seals, instruction sheets, and other various forms, are strategically placed inside of a blood kit to assist the officer when the 'blood job' is performed.⁹¹ An additional substance contained within the kit vials, commonly known as an 'anticoagulant,' is used to prevent the blood from clotting.⁹² Prevention of clotting helps to maintain the correct blood alcohol content at the time the sample is drawn.⁹³ Blood is placed in a vacutainer, a sterile tube designed to prevent interference with stored samples, and is mixed with preservatives,⁹⁴ to maintain this blood alcohol level. Such a vial and preservatives are used because alcohol dissipates more rapidly than other substances which can be found in the blood.⁹⁵ New York law mandates the use of such vials, preservatives and

⁸⁹ See *id.* (explaining preservation procedure).

⁹⁰ See University of Arkansas for Medical Sciences, *Specimen Container Types*, Clinical Laboratory, at <http://www.uams.edu/clinlab/specimencont.html> (last visited Feb. 15, 2004) (describing different types of vacutainer tubes); see also Becton Dickinson, *Vacutainer Blood Collection Tubes and Safety-Lok Accessories*, at <http://www.vgdlc.com/bbs/messages/VACUTAINER.html> (last visited May 28, 2005) (providing technical information regarding design and purpose of vacutainer tubes).

⁹¹ See NIK Safety Collection Kits, at <http://www.armorholdings.com/productsdiv/nik.asp> (last visited March 28, 2005) (noting different items contained in kits from NIK Public Safety, dominant maker of law enforcement blood kits).

⁹² See *Ethanol: Sample Collection and Preparation for Analysis* at <http://www.toxicology.lsumc.edu/ethanol.htm> (last visited May 11, 2004).

⁹³ See *id.*

⁹⁴ The correct term to define the process in which the blood, anticoagulant and preservatives are mixed is known as 'inverting' the blood vial. See http://www.labcorp.com/datasets/labcorp/html/frontm_group/frontm/section/speccol.htm (last visited March 28, 2005) (stating tubes containing the preservatives must be turned over in order to properly mix the preservatives).

⁹⁵ See *Alcohol and the Human Body*, at <http://www.intox.com/physiology.asp> (last visited March 28, 2005) stating,

Healthy people metabolize alcohol at a fairly consistent rate. As a rule of thumb, a person will eliminate one average drink or .5 oz (15 ml) of alcohol per hour. Several factors influence this rate. The rate of elimination tends to be higher when the blood alcohol concentration in the body is very high or very low. Also chronic alcoholics may (depending on liver health) metabolize alcohol at a significantly higher rate than average. Finally, the body's ability to metabolize alcohol quickly tend to diminish with age.

see also *Alcohol Absorption, Distribution and Elimination*, at <http://www.forcon.ca/learning/alcohol.html> (last visited March 28, 2005) (stating, "[t]he median rate of decrease in BAC is considered to be 15 milligrams per cent (mg%) per hour.").

anticoagulant to be used in the withdrawal process.⁹⁶ Title ten, section 59.2 of the New York Compilation of Codes Rules and Regulations⁹⁷ specifically states that “[b]lood must be drawn with a: (i) sterile dry needle into a vacuum container containing a solid anticoagulant; or (ii) sterile dry needle and syringe and deposited into a clean container containing a solid anticoagulant, which container shall then be capped or stoppered, and identified.”⁹⁸

In order to preserve the blood alcohol content in the blood specimen, a police officer follows certain guidelines that may be different than the hospital's procedures for handling the same type of specimen.⁹⁹ In sum, a police officer must have a physician, a registered nurse, a registered physician's assistant, a medical laboratory technician or technologist, or an authorized individual possessing necessary competence and acting under the supervision of a laboratory director and physician draw the blood from the defendant.¹⁰⁰ The sample is to be collected within two hours of the time of arrest,¹⁰¹ and the defendant's skin, in the area where the sample is to be drawn, is to be rubbed with an aqueous non-alcoholic solution containing a nonvolatile antiseptic.¹⁰² This substance is applied to the area by use of a swab. The sample is to be drawn using the aforementioned type of needle and containers.¹⁰³ Legally, failure to adhere to these procedures in drawing blood may lead to suppression of the blood results.¹⁰⁴ Scientifically, and without delving in depth about

⁹⁶ Methods and Procedures for Determining Blood and Urine Alcohol, 10 NYCRR § 59.2(c)(4)(ii) (2005) (noting requirements for proper storing of blood samples).

⁹⁷ See N.Y. COMP. CODES, R. & R., tit. 10, § 59.2 (2005) (outlining methods and procedures for taking blood).

⁹⁸ See N.Y. COMP. CODES, R. & R., tit. 10, § 59.2 (c)(4) (2005) (noting proper procedure for taking blood).

⁹⁹ See generally *People v. Thomas*, No. 01-0429-001, 2001 N.Y. Misc. LEXIS 946 (N.Y. Sup. Ct. Oct. 30, 2001) (comparing differences between general hospital procedures, and those police must follow pursuant to New York law).

¹⁰⁰ See N.Y. VEH. & TRAF. L. § 1194 (4)(a)(1) (2004) (designating certain persons as qualified to withdraw blood).

¹⁰¹ See *id.* at § 1194 (2)(a)(1) (setting forth two-hour time period for administering tests).

¹⁰² See N.Y. COMP. CODES, R. & R., tit. 10, § 59.2 (c)(3) (2005) (setting forth rule that alcoholic solutions are not used in order to prevent any type of interference with blood alcohol content reading).

¹⁰³ See *NIK Safety Collection Kits*, at <http://www.armorholdings.com/productsdiv/nik.asp> (last visited March 28, 2004) (providing information about law enforcement blood kits).

¹⁰⁴ See *People v. Ebner*, 195 A.D.2d 1006, 1007 (4th Dept. 1993) (suppressing results of blood test in D.W.I. case when test was authorized but not observed by registered nurse, and no evidence existed that test was authorized by physician).

every possible way in which a sample can be negatively affected, it is safe to say that the less that the sample is properly preserved,¹⁰⁵ the lower the chance of obtaining a correct blood alcohol content reading.¹⁰⁶ This latter reason, in turn, may lead to the creation of unnecessary exculpatory evidence that must be readily made available to defense.¹⁰⁷

Use of the inevitable discovery theory in blood sample cases has been thought of,¹⁰⁸ and somewhat discussed,¹⁰⁹ but not applied. In the absence of a situation involving coercive tactics,¹¹⁰ or unreasonable and hence unconstitutional circumstances,¹¹¹ there exists no reason why a good-faith argument should not be afforded consideration, should proper use of a *Bolson* warrant be made. In this situation, the

¹⁰⁵ See Walter S. Piper, *Preservation of Blood Samples*, at http://www.briloon.org/blood_preservation.html (last visited November 2, 2002) (outlining general practice of adding preservatives to blood samples to ensure that subsequent testing is as effective as possible).

¹⁰⁶ But see *People v. Boyst*, 177 A.D.2d 962 (4th Dept. 1991) (upholding procedure in which blood serum, rather than anticoagulant, was used in preservation of blood sample, which is authorized to be tested for blood alcohol content under New York law). This case appears to stand for the proposition that so long as an authorized substance is tested, the lack of use of preservatives in the blood sample would go towards the credibility of the evidence, and not automatically preclude its admissibility.

¹⁰⁷ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

¹⁰⁸ See *People v. Siripongs*, 754 P.2d 1306, 1317 (Cal. 1988) (recognizing even though defendant's blood was not lawfully drawn, it was harmless error because "[a] blood sample would inevitably have been [legally] drawn and would have disclosed the identical information used against [the defendant] at trial").

¹⁰⁹ See *Iowa v. Bartlett*, No. 1-800 / 01-0158, 2002 Iowa App. LEXIS 878, at *2 (Iowa Ct. App. August 14, 2002) (mentioning prosecution's argument to admit blood sample under inevitable discovery doctrine, even though court never itself addressed this issue); see also *State v. Christianson*, 627 N.W.2d 910, 912-13 (Iowa 2001) (refusing to admit results of blood test under inevitable discovery theory in case where no basis to believe that defendant was intoxicated existed subsequent to motor vehicle accident, and taking into account Iowa's implied consent laws); *State v. Ravotto*, 169 N.J. 227, 244 (2001) (citing *Nix*, finding 'independent source' theory as not applicable to situation in which blood samples were obtained by unreasonable force because, despite prosecution's arguments to contrary, it is not clear whether prosecution still would have received blood tests through lawful mean).

¹¹⁰ See *Ravotto*, 169 N.J. at 231 (noting despite "defendant's right to be free of unreasonable searches under the federal and State Constitutions," defendant's legs and left arm were strapped to table, while several persons, including two police officers, held him down as nurse drew eight vials of blood).

¹¹¹ See *Winston v. Lee*, 470 U.S. 753, 767 (1985) (finding state-ordered surgery to remove bullet in armed robbery suspect's body was unreasonable search, and as such, was unconstitutional); see also *People v. Ellis*, 190 Misc.2d 98, 106 (Cattaraugus Co. Crim. Ct. 2001) (suppressing blood test results in D.W.I. case, finding that consent was obtained after police officer provided defendant with "inaccurately threatening legal repercussions" when speaking of consequences of failing to consent to taking of blood sample).

prosecutor would have both the initial blood sample, albeit potentially inadmissible, as well as the second blood sample. In theory, however, both items should be similar pieces of evidence.

Nevertheless, the prosecutor should be prepared to counter a defense contention that the secondary sample is not admissible through the use of inevitable discovery principles because of the New York distinction between inadmissible primary evidence and admissible secondary evidence.¹¹² Essentially, it would appear that the argument to be advanced is, in sum and substance, that if the initial piece of evidence, the blood sample drawn at the request of the police, is not admissible against the defendant due to invalid consent, then the search warrant for the secondary sample should not be allowed to retroactively justify admission of the first blood sample under the inevitable discovery theory because the two blood samples are the same. The defense argument would be that even if inevitable discovery principles were applicable to the situation, New York's prohibition against admitting primary evidence would preclude admission of the blood sample because in this situation, both the primary and the secondary evidence are the same. Thus far, New York case law discussing inevitable discovery applicability has not addressed a situation in which the primary and secondary evidence were the same item obtained through police misconduct.¹¹³

Of course, the defense can also proffer two separate contentions: that use of the second blood sample would circumvent the principles behind the physician-patient privilege; and that since the secondary blood sample was affected in a way that ultimately created exculpatory evidence, the prosecution cannot demonstrate a "very high degree of probability"¹¹⁴ that

¹¹² See *People v. Turriago*, 90 N.Y.2d 77, 86 (1997) (highlighting that court has established "primary evidence. . . would still be subject to exclusion even if it would most likely have been discovered in the course of routine police procedures").

¹¹³ See generally John Brunetti, *Criminal Procedure*, 48 SYRACUSE L. REV. 517, 519-20 (1998) (highlighting that New York Court of Appeals has recognized that inevitable discovery exception will not save primary evidence from suppression, but will apply to secondary evidence).

¹¹⁴ See *People v. More*, 97 N.Y.2d 209, 213 (2002) (highlighting "even where there is a clear indication that incriminating evidence will be retrieved if the bodily intrusion is permitted, search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned"); see also *People v. Fitzpatrick*, 32 N.Y.2d 499, 506 (1973) (noting in order to apply inevitable discovery doctrine, prosecution must show that, absent illicit conduct, police investigation still would have led to evidence). See generally *Nix v. Williams*, 467 U.S. 431, 443 (1984) (noting in order to invoke inevitable discovery doctrine, prosecution

the correct blood alcohol results would have been obtained anyway.

Although the latter two concepts may have some merit, this article focuses on the first contention, notably the distinction between primary and secondary evidence.¹¹⁵ Obviously, the first blood sample drawn from the defendant is identical to other samples, drawn for diagnostic purposes. In addition, both items are potential pieces of incriminating evidence that were (in the usual situation) sought and withdrawn contemporaneously with one another. There should exist little, if any, distinction between the initially obtained sample and the sample sought via the warrant. Most likely, the only differences are that each specimen was placed into different vials, contain different levels of preservatives and anticoagulants, and may have involved different types of swabs used to cleanse the skin in the area where the blood was drawn.¹¹⁶

Nevertheless, the prosecutor should advance inevitable discovery principles. Despite there being little factual distinction between the primary and secondary evidence in this situation, the prosecutor should argue that there is a legal distinction between the two samples that would allow applicability of the inevitable discovery theory. The prosecutor should argue that those cases applying inevitable discovery principles usually involve situations in which invalid consent or unlawfully obtained statements by a defendant lead to the discovery of incriminating physical evidence.¹¹⁷ In the situation that is the

must establish by preponderance of evidence that information ultimately or inevitably would have been discovered by lawful means).

¹¹⁵ It should be noted that although an argument negating the likelihood of a high probability that the blood sample with the correct blood alcohol level would have been obtained anyway due to reasons for why the sample was negatively affected intimately relates to the inevitable discovery theory, it is not being addressed in this article because it hinges on a question of fact, to be answered on a case by case basis. In this situation, the general principles of inevitable discovery would have to apply. In addition, the contention that use of the defendant's blood sample would be an unfair governmental attempt to protect a highly recognized privilege should be deafened by the clear distinction between protected information between physician and patient and physical tangible property, which the blood sample is.

¹¹⁶ See *People v. Thomas*, No. 01-0429-001, 2001 N.Y. Misc. LEXIS 946, at *3 (N.Y. Sup. Ct. Oct. 30, 2001) (describing possible differences in procedures used).

¹¹⁷ See, e.g., *Turriago*, 90 N.Y.2d at 82–83 (providing situation in which, if probable cause at time of arrest was lacking, inevitable discovery principles could be invoked to allow admissibility of evidence obtained from statements made by defendant); see also *Nix*, 467 U.S. at 446–47 (illustrating classic situation in which illegally obtained

subject of this article, the evidence sought to be admitted is an item that would have been obtained anyway based on the circumstances, regardless of whether or not the police ever became involved. The prosecutor should argue that blood would have been drawn anyway by hospital personnel, individuals not involved with law enforcement, and that the blood would have been drawn pursuant to hospital procedures for diagnostic testing. As the sample would have been obtained without any influence by anyone acting for or as an agent of law-enforcement, and would have been obtained pursuant to established hospital procedures, it would have been in existence even if no police presence or request for the sample were made. Further, and in the alternative, for this reason, the prosecutor should point out that the secondary specimen that is sought through the warrant is not within the literal New York definition of 'secondary evidence,'¹¹⁸ as it was not obtained as a result of or product of the primary evidence, the initial sample. Thus, there is no causal connection between the evidence that is sought and the taint due to unlawful police activity.¹¹⁹ This lack of a connection negates any improper exploitation of misconduct. Notwithstanding, the only notable distinction between the two vials would be how they would be separately handled pursuant to police department and hospital procedures. As such, the end result would be that the actual blood sample would have anyway, inevitably, been lawfully obtained. And despite there lacking a possible distinction without an evidentiary or privileged difference between the initial and secondary sample, the bottom line would be that as the evidence was lawfully obtained in the first place, the inevitable discovery distinction between use of primary and secondary evidence should not bar admission of what the prosecution has lawfully and diligently sought from the outset—the physical blood specimen. This use of the second sample would not “defeat a primary purpose [of the inevitable discovery doctrine,] deterrence of police misconduct.”¹²⁰ In addition,

statements lead to discovery of physical evidence admitted against defendant at trial pursuant to the inevitable discovery theory).

¹¹⁸ See, e.g., *Turriago*, 90 N.Y.2d at 86 (defining secondary source).

¹¹⁹ See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 320 (1985) (Brennan, J., dissenting) (discussing new rule adopted by Court); see also *Taylor v. Alabama*, 457 U.S. 687, 697 (1982) (stating controlling substantive law).

¹²⁰ *People v. Stith*, 69 N.Y.2d 313, 319 (1987).

preclusion of a secondary sample, legally obtained via warrant, would place the government in a weaker position than it originally was in, a position also contrary to another main rationale used to justify the inevitable discovery principle.¹²¹ In addition, little merit should be placed in any defense claim that application of inevitable discovery principles to this situation would discourage the police in properly having or obtaining valid consent, as there still would exist little incentive to disregard established principles and procedures when performing 'blood jobs' in cases involving personal injuries or substantial property damages.

Further, a defendant would not have any greater possessory interest in the blood obtained via warrant than he would have in the blood obtained at the request of the police.¹²² As such, there is no greater intrusion of an individual's personal privacy by law enforcement than initially was present. The defendant's expectation of privacy¹²³ in the secondary blood sample is *de minimus*, as the defendant purported to waive any privacy right or privilege in the specimen from the outset of treatment. Thus, there appears to be no constitutional distinction between the privacy rights afforded to the primary evidence as compared to the secondary evidence, providing increased justification for application of the inevitable discovery theory to search warrants for diagnostic blood samples.

VI. CONCLUSION

This piece has discussed two principles of New York law that, on its face, do not seem to bear any relation to one another. Nevertheless, prosecutors of drinking and driving related offenses involving substantial property damage or victims should be somewhat familiar with the applicability of the physician-

¹²¹ See *Nix v. Williams*, 467 U.S. 431, 444 (1984) (stating rationale of inevitable discovery principle).

¹²² See *State v. Barkley*, 551 S.E.2d 131, 135 (N.C. Ct. App. 2001) (stating "defendant does not challenge the validity of the taking of the blood sample; rather defendant concedes it was done with his consent. Once the blood was lawfully drawn from defendant's body, he no longer had a possessory interest in that blood.").

¹²³ See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (formulating two part test that would become followed cornerstone of Fourth Amendment analysis—that individual is afforded constitutional protection when reasonable expectation of privacy that society is willing to accept as reasonable is subject of search).

patient privilege as well as the inevitable discovery theory. So long as the protections afforded by the physician-patient privilege are not pierced, proper use of an inevitable discovery theory should be advanced to admit an initial blood sample found by a suppression court to be improperly obtained. Use of this theory may help serve a substantial purpose, as well as an affirmative tool, in the fight against those who consume enough alcoholic beverages to affect one's ability to drive, and then get into the driver's seat.